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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE DAVIS COMPANY, *Petitioner*,

v.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; AND WILLIE RUDD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

I. Does Section 7 of the Labor Management Relations Act, 29 U.S.C. § 157 (1976), and this Court's decision in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), preempt the defamation law of Tennessee and immunize false and misleading statements posted on the employer's bulletin board by the union president where both the trial and appellate courts find that the posting of such statements violate the collective bargaining agreement between the union and the employer?

II. Do this Court's decisions in *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979) and *Complete Auto Transit* v. *Reis*, ___ U.S. ___, 101 S.Ct. 1836 (1981), require dismissal of a claim by an employer for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), where the breach of the contract is committed by the union president admittedly acting within the course and scope of his authority?

LIST OF PARTIES

Petitioner (hereinafter referred to as The Davis Company or the Company), is an employer engaged in interstate commerce in Memphis, Tennessee, and is a wholly owned division of National Bedding and Furniture Industries, Inc., of Memphis. National Bedding and Furniture Industries, Inc., also owns Serta Mattress Company and National Fibers Company of Memphis. The Davis Company's claims against United Furniture Workers of America AFL-CIO (the International) were dismissed by the trial judge, and the Davis Company's appeal of that dismissal was dismissed before the United States Court of Appeals for the Sixth Circuit, and thus the International is not a party in this proceeding. Local 282, United Furniture Workers of America, AFL-CIO, is a labor organization in Memphis, Tennessee, and Willie Rudd is its President.

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OPINIONS BELOW

The judgment of the United States District Court for the Western District of Tennessee, entered on June 3, 1980, is printed in Appendix B hereto. The findings of fact and conclusions of law of the United States District Court for the Western District of Tennessee (unreported), entered on May 30, 1980, is printed in Appendix C. The opinion of the United States Court of Appeals for the Sixth Circuit, dated March 31, 1982, is reported at 674 F.2d 557.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 31, 1982. The Davis Company filed a timely petition for rehearing, with

suggestion for rehearing en banc. The petition was denied by order dated May 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions involved. The statutes involved are 29 U.S.C. § 185 and 29 U.S.C. § 157, which are printed verbatim in Appendix E.

STATEMENT OF THE CASE

On September 6, 1977, The Davis Company entered into a collective bargaining agreement with Local 282 of the United Furniture Workers of America, AFL-CIO (the Union), concerning wages, hours, and conditions of employment at The Davis Company in Memphis. In Article X of that agreement, the Company agreed to provide an in-plant bulletin board for use by the Union in giving notice of union activities. In consideration of the Company's agreement to provide a bulletin board, the Union agreed as follows in Article X, Section 4:

> "The Union agrees that it will not publish or circulate any false or misleading remarks about the employer, its products, its officers, and other personnel."

The collective bargaining agreement provided for a grievance procedure, but there was no provision for binding arbitration, and there was not a no-strike clause. The collective bargaining agreement did provide, however, that the Union would observe a five day "cooling off" period after the unsuccessful resolution of a grievance before engaging in a strike.

On June 27, 1978, a number of employees filed a grievance claiming that they were entitled to additional overtime pay. The parties followed the grievance procedure

during which the Company discovered that certain employees had not been paid on a daily overtime basis as required in the collective bargaining agreement, and by mid-July, 1978, the Company had voluntarily disbursed checks to all affected employees for the additional pay.

The Union, however, at the insistence of its president, Willie Rudd, continued the grievance and claimed that they were entitled to double payment of overtime hours. The trial court found, and the appellate court agreed, that Mr. Rudd's contention was spurious and directly contrary to a provision in the collective bargaining agreement which prohibited the pyramiding of overtime. Additional grievance meetings pursuant to the grievance procedure were held between the Company and the Union on July 20 and August 2, 1978, during which the Company made known its position concerning no pyramiding of overtime. During the grievance procedure, Willie Rudd was among those present representing the Union.

After the August 2 meeting, Rudd drafted and caused to be distributed and posted on the bulletin board provided by the Company pursuant to Article X of the collective bargaining agreement a "Special Bulletin" which stated that The Davis Company has "*cheated* the employees out of *thousands of dollars* on overtime pay." [Emphasis in the original.]

During the evening of August 2, the Union held a meeting during which no strike was authorized, encouraged or even discussed. However, both union stewards who were at the meeting testified at trial that they felt they had been cheated, and testified that those at the meeting expressed their feelings that they believed they had been cheated by the Company. The next day, August 3, 1978, a number of key employees walked out of the plant, and among the employees who did walk out were

those who held critical jobs such that the plant was forced to cease production. All union stewards who were working at the time joined in the walkout. Limited production resumed August 7, but full production did not resume until August 9. The damages proven by the Company as a result of the walkout were never disputed in the trial court or on appeal.

The Company argued and the district court and appellate court both found that the "Special Bulletin" which was drafted by Willie Rudd, and posted and disbursed at Mr. Rudd's directions, was false, was misleading, and constituted a breach of the collective bargaining agreement on the part of the Union. The trial court had jurisdiction of the claim under 29 U.S.C. § 185(a). Because it was uncontested that Mr. Rudd was acting within the course and scope of his authority as Union president when he caused the bulletin to be posted, the district court held the Union liable for the breach of the collective agreement pursuant to 29 U.S.C. §§ 185(b) & (e).

The district court also found that the bulletin contained a deliberate falsity accusing the company of dishonesty, and that therefore the bulletin was defamatory under Tennessee law. Applying the standards of *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), the trial court found that the libel was committed with malice, and therefore that both Mr. Rudd and the Union were jointly liable for defamation. The court had jurisdiction over this claim pursuant to pendent jurisdiction.

The district court found, and the appellate court agreed, that the August 3 walkout did not result from any claim on the part of the Union to exercise any lawful right to strike, walk out, or protest. The district court found, and the appellate court agreed, that the sole, direct and proximate cause of the walkout was the false, misleading

and inflammatory statements of Mr. Rudd that the company had cheated the employees out of thousands of dollars.

However, the appellate court reversed the district court on both the breach of collective bargaining agreement and defamation claims. Although recognizing its obligations to affirm findings of fact of the trial court unless clearly erroneous, the Court of Appeals nevertheless reversed the district court's finding that the defamation was published with malice. The Court of Appeals erroneously weighed the evidence and found that the publication was not actionable under *Letter Carriers* v. *Austin*, *supra*. The Court of Appeals thus held that the libel laws of Tennessee were preempted by Section 7 of the Labor Management Relations Act (the Act), 29 U.S.C. § 157, under which recovery is prohibited in the absence of proof of malice.

The Court of Appeals, however, agreed with the district court that the posting of the "Special Bulletin" constituted a breach of the collective bargaining agreement and that the walkout and consequent loss of production were proximately caused by the breach. Despite affirmance of those specific findings, the Court of Appeals employed the *non sequitur* that the loss of production, and thus the damages, incurred by the company resulted from the failure of the employees to remain on their jobs, and not from the act of posting the "Special Bulletin." Even though this case did not involve a cause of action for breach of a no-strike agreement, the Sixth Circuit apparently relied on this Court's precedents in *Complete Auto Transit* v. *Reis*, ___ U.S. ___, 101 S.Ct. 1836 (1981), and *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979), to hold that the Union could not be liable for breach of a collective bargaining agreement

in the absence of a showing that it had either authorized, participated in, or ratified the strike.

The judgment of the district court was therefore reversed and remanded with orders to dismiss the Company's complaint.

REASONS FOR GRANTING THE WRIT

The treatment of the Company's defamation claim by the Sixth Circuit involves an important question of federal law which has not been settled by this Court. In *Letter Carriers* v. *Austin*, *supra*, the Court declined to prescribe the limitations of *Linn's* preeemption of state defamation laws by the policies of federal labor law. Both *Linn* and *Letter Carriers* involved preemption in the setting of a union organizational drive, where robust speech is expected and condoned under federal labor law. The defamation in this case, however, occurred between parties to a collective bargaining agreement which specifically prohibited the language employed by Mr. Rudd. This case therefore presents a conflict of competing policies of federal labor law: free speech versus insuring the integrity of collective bargaining agreements.

The Sixth Circuit's dismissal of the Section 301 action for breach of the collective bargaining agreement conflicts with Section 301(b) & (e) of the Act and this Court's decision in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). The posting of the "Special Bulletin" by Mr. Rudd was a breach of the collective bargaining agreement, and Mr. Rudd was admittedly acting within the scope of his authority as the Union's president and agent. Yet the Sixth Circuit absolved the Union from liability because of the alleged lack of proof that the Union authorized the walkout which resulted from the breach of the contract. This ruling results in a serious erosion of the

accountability of both unions and employers for the acts of its agents.

I.

Certiorari Should Be Granted In Order To Refine The Scope Of Federal Preemption Of State Defamation Laws Where The Defamation Does Not Occur During Union Organizational Campaigns, And Where The Defamation Specifically Violates A Collective Bargaining Agreement Between The Parties.

In *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court expressed concern about the possible deleterious effects of state defamation law on national labor policy. In *Linn*, a union official published defamatory remarks concerning an official of the employer during an organizational campaign. The union accused the official of "robbing" the employees of pay increases, and of "lying" to them. *See* 383 U.S. at 56. Relying heavily on the need of both the employer and the union to have some leeway in making statements about each other during union organizational attempts, this Court decided to protect defamatory statements made during organizational campaigns with the standards of "malice" first adopted by the Court in dealing with suits against newspapers. *See New York Times Company* v. *Sullivan*, 376 U.S. 259 (1964). The Supreme Court in *Linn* thus held that the National Labor Relations Act preempted state defamation law and would prevent recovery by the plaintiff for defamatory publications made during a union organizational drive unless the plaintiff proved malice and resulting injury. "Malice" was defined as a publication of defamatory remarks with either knowledge of its falsity or reckless disregard as to its truth. *See* 383 U.S. at 61.

In *Old Dominion Branch No. 496, National Association of Letter Carriers (Letter Carriers)* v. *Austin*, 418 U.S. 264 (1974), this Court again examined its pre-

emption doctrine first announced in *Linn* in the context of a continuing union organizational drive. In *Letter Carriers*, a non-union employee sued a union for publishing a newsletter containing derogatory comments about him. The Court reaffirmed the requirement of *Linn* that the plaintiff show malice and injury.

In *Letter Carriers*, the plaintiff attempted to avoid the requirements of *Linn* by arguing that no "labor dispute" within the meaning of *Linn* was presented by the facts of the case. The Court thus limited its opinion in *Letter Carriers* as to the reach of *Linn's* preemption requirements by stating:

> "It is true, as appellees point out, that there was no dispute between labor and management involved here, and that the union's organizing effects were neither during the course of a representation election campaign nor directed toward achieving recognition. But whether *Linn's* partial preemption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, *application of Linn must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.*"

See 418 U.S. 279-80 [emphasis supplied].

The facts before this Court, however, do not involve those policies of the federal labor law leading to the protection for freedom of speech. To the contrary, the federal interest involved in this case is the protection of the integrity of collective bargaining agreements. As the Sixth Circuit itself pointed out, the Union's promise to refrain froim posting false or misleading statements on the bulletin board was a *quid pro quo* for the offer of the employer to provide an in-plant bulletin board. The re-

striction on the use of the bulletin board by the Union was narrow and reasonable, and the Union was bound by it. The reasoning behind this agreement between the Company and Union was apparent by the actual result in this matter. The Company wanted to avoid work disruptions which could result from inflammatory language on the bulletin board, and thus gave the Union access to a bulletin board only in return for the Union's promise to prevent disruption by refraining from posting inflammatory material. The fears of the Company were realized in this case when false and misleading material posted in violation of the collective bargaining agreement led to a walkout by the employees.

Having entered into an agreement to refrain from posting false and misleading statements, the Union should not be allowed to rely on the preemptive effects of *Linn* by arguing that the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated. This case did not involve those narrow situations, such as organizational drives, which have been protected from state defamation laws because of the necessity for freedom of speech and "rough and tumble" language. Therefore, the Sixth Circuit erred in holding that *Linn's* partial preemption of state libel remedies barred recovery in this case. The Petitioner asserts that this Court in its decisions in *Linn* and *Letter Carriers* did not intend to absolve parties to a collective bargaining agreement from their responsibilities and liabilities under a collective bargaining agreement.

At the time that *Linn* was decided, many states, including Tennessee, would allow recovery for defamation even in the absence of proof of actual damages, and without proof of any fault on the behalf of the defendant. The concern for large jury verdicts against unions was ob-

vious in this Court's decision in both *Linn* and *Letter Carriers*. The Petitioner would point out to the Court that the Tennessee courts have ruled that a plaintiff may recover for defamation only upon proof of actual damages, and proof of at least negligence on behalf of the defendant. *Memphis Publishing Co.* v. *Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978); *Handley* v. *May*, 588 S.W.2d 772, 776 (Tenn. App. 1979).

Although the petitioner asserts error in the standards used by the Sixth Circuit, the Petitioner would argue that the requirements of *Linn* and *Letter Carriers* were met in this case in any event. The trial court specifically relied on the standards of *Letter Carriers*, and found that the defamation was uttered with malice in that Mr. Rudd's bulletin contained a deliberate falsity. That finding of fact, based on the trial court's observation of the demeanor of Mr. Rudd as a witness, should have been affirmed unless clearly erroneous. The Sixth Circuit, however, felt obligated to conduct an independent examination of the record because the case involved defamation under the federal labor laws. The Sixth Circuit's reliance on *Letter Carriers*, however, was erroneous. In *Letter Carriers*, this Court did decide, as a matter of law, that the word "scab" could not be libelous because the plaintiff was in fact a scab, and thus the accusation was true. In the instant case, however, the Sixth Circuit attempted to disturb a finding of fact which relied on the state of mind of Mr. Rudd, and whether he published the false statements with knowledge of their falsity, or reckless disregard as to their truth. The trial judge, who observed the demeanor of Mr. Rudd as a witness, should and did make that determination, and the Sixth Circuit did not have the authority to reverse that finding of fact as a matter of law.

II.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Sixth Circuit Decided A Federal Question In Conflict With Applicable Decisions Of This Court And Federal Statutes By Exculpating A Union From Liability For Breach Of A Collective Bargaining Agreement When The Conduct Constituting The Breach Was Committed By The Union President Acting Within The Course And Scope Of His Authority.

The trial court found, and the appellate court agreed, that a breach of the collective bargaining agreement occurred when Mr. Rudd caused to be posted a bulletin which accused the company of cheating its employees, thus constituting "false or misleading" statements prohibited by Article X, Section 4 of the collective bargaining agreement. Any relief against Mr. Rudd individually for breach of the collective bargaining agreement was barred by this Court's decision in *Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238 (1962), which holds that Section 301(b) of the Act, 29 U.S.C. § 185(b), prohibits a judgment against any individual member of the union for breach of a collective bargaining agreement. However, it was never disputed that Mr. Rudd was acting within the course and scope of his duties as President of Local 282 when he caused the bulletin to be posted. The trial court correctly relied on Sections 301(b) and (e) of the Act, 29 U.S.C. §§ 185(b) and (e), which hold that both labor organizations and employers are bound by the acts of their agents, and that the acts of a union's agent need not be actually authorized or subsequently ratified to hold that the union is liable for the breach of the collective bargaining agreement, and is responsible for the damages occasioned by that breach. At no time in this case was it disputed that Mr. Rudd was acting as an agent of the Union when he committed the breach of the collective bargaining agreement.

The Sixth Circuit, however, did not apply Sections 301(b) and (e) when it exculpated the Union from liability for breach of the collective bargaining agreement. The Sixth Circuit agreed that the posting of the "Special Bulletin" was a breach of the collective bargaining agreement, and that this breach caused a walkout by the employees, leading to the employer's damages. The Sixth Circuit, however, concluded that the Union could not be held liable for damages resulting from the walkout in the absence of a showing that it had either authorized, participated in, or ratified the "strike." In so holding, the Sixth Circuit relied on case precedents involving employer suits under Section 301(a) for breach of a no-strike clause in the collective bargaining agreement. In this case, however, the walkout by the employees did not constitute a breach of the collective bargaining agreement, because there was not a no-strike clause in the contract. In the instant case, the breach of the collective bargaining agreement occurred at the posting and the distribution of the bulletin; and the walkout, as found by both the trial and appellate court, was proximately caused by that breach, and constituted the damages proximately flowing from the breach.

In reaching its conclusion, the Sixth Circuit relied on this Court's decisions in *Complete Auto Transit* v. *Reis*, ___ U.S. ____, 101 S.Ct. 1836 (1981), and *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979). Both cases, however, are inapposite. *Complete Auto Transit* involved the question whether an employer may maintain a suit for damages against individual defendants acting not in behalf of the union but in their personal and non-union capacity where their unauthorized individual action violated the no-strike provision of the collective bargaining agreement. *Carbon Fuel Company* addressed the issue of the liability of an international union

for damages occasioned by a local union's breach of a no-strike clause. Neither of these cases involved the situation where an employer seeks a monetary recovery against a union because of the acts of the union president while acting within the course and scope of his authority.

The Davis Company cannot reconcile the holding of the Sixth Circuit that the walkout did result from the posting of the "Special Bulletin" containing language which breached a provision of the collective bargaining agreement, and the court's later conclusion that the damages resulted from the failure of the employees to remain on their jobs, not from the act of posting the "Special Bulletin." *See* 674 F.2d at 564, 565.

The absolution of the union for damages to the employer occasioned by the conduct of its president constituting a breach of the collective bargaining agreement undermines the liability of both employers and labor organizations for the acts of their agents, which liability is required in Section 301 of the Act. As this Court explained in *Atkinson* v. *Sinclair Refining Company*, *supra*, Congress intended familiar principles of the law of agency to apply in Section 301 suits, including the principle that proof of actual authorization or ratification of the agent's act by his principal is not required. *See also Carbon Fuel Company*, *supra*, at 464, n. 6. Congress mandated by Section 301(b) and Section 301(e) that neither employers nor labor organizations could escape liability for the acts of their agents acting within the course and scope of their authority, even though the specific act was not actually authorized or subsequently ratified.

The Petitioner would have no quarrel with the decision of the Sixth Circuit if the basis of its claim had been the breach of a no-strike clause by wildcat strikers acting without the authority of either their local union or the

international union. Such situations would in fact be controlled by this Court's principles enunciated in *Complete Auto Transit* and *Carbon Fuel*. However, the instant case involves the breach of the collective bargaining agreement by the Union president acting within the scope of his authority. The result of the decision of the Sixth Circuit is to relieve the Union for the responsibility of its president's acts. The Petitioner believes that such a decision will impact strongly on the liability of both employers and labor organizations where either the employer or the labor organization seeks to escape the financial consequences of the acts of its agents. The Sixth Circuit agreed with the district court's finding that the walkout was proximately caused by the bulletin. As Judge Weick pointed out in his dissent, substantial evidence supported the district court's finding that the walkout and damage sustained by the employer resulted from the breach of the collective bargaining agreement, and that the Union enjoys no exemption from liability.

In Sections 301(b) and (e) of the Act, Congress intended to insure the integrity of collective bargaining agreements by requiring that both employers and labor organizations be responsible for the acts of their agents. This mandate surely includes the acts of union and company presidents. In the instant case, the Union, through its president acting within the scope of his authority, has breached a collective bargaining agreement, resulting in proven damage to the employer, and yet the Union has escaped liability for that breach. The Petitioner therefore urges that certiorari be granted to consider the result in this case in light of Sections 301(b) and (e) of the Act.

Finally, the petitioner would point out that it was established without contradiction or cross-examination at trial that the union stewards participated in the walkout.

It is well established that stewards act as agents of a labor organization, as do foremen act as agents of the employer, under Sections 301(b) and (e) of the Act. Acts of the steward can constitute evidence of union participation in unlawful conduct. *See N.L.R.B.* v. *Brewery & Beer Distributor Drivers*, 281 F.2d 319, 321-322 (3d Cir. 1960); *N.L.R.B.* v. *International Brotherhood of Boilermakers*, 321 F.2d 807, 810 (8th Cir. 1963); *N.L.R.B.* v. *Local No. 135*, 267 F.2d 870, 872 (7th Cir. 1959); *Airco Speer Carbon-Graphite* v. *Local No. 502*, 494 F.Supp. 872 (W.D. Pa. 1980). Therefore, even if the Sixth Circuit were correct in holding that the Union cannot be responsible for damages absent evidence of union participation in the walkout, substantial evidence of such participation exists in this case by the fact that the union stewards joined in the walkout.

Respectfully submitted,

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